83-2134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

DAVID N. BOCKOVEN, ET AL.,

Petitioners,

v.

JOHN O. MARSH, JR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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June 25, 1984

QUESTIONS PRESENTED FOR REVIEW

I. Whether the rights of Petitioners to be considered for temporary promotion in the Army on a fair and equitable basis as set forth in 10 U.S.C. §3442(c) were denied when Department of the Army Reconstituted Selection Boards which reconsidered Petitioners for promotion removed promotion zone vacancies from consideration for which Petitioners could have otherwise competed.

II. Whether certain Department of the Army temporary Selection Boards convened in 1976 deprived Petitioners of their rights as set forth in 10 U.S.C. §§266, 277 and 3442(c) and Department of Defense Instruction 1205.4 because those Selection Boards failed to contain an appropriate number of Reserve officer members.

III. Whether Petitioners waived any entitlement to relief as accorded plaintiffs similarly situated in Doyle v. United States, 599 F.2d 984, modified, 609 F.2d 990 (Ct.Cl. 1979), cert. denied, 446 U.S. 982 (1980).

IV. Whether Petitioners were denied their right to promotion consideration on a fair and equitable basis as set forth in 10 U.S.C. §3442(c) because 1976 Temporary Selection Boards had before them records of Petitioners that contained evidence of their previous illegal nonselection that materially impacted upon their opportunity for selection.

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Petitioners, David N. Bockoven, John F. Bales, Edward L. Bast, Lawrence Henderson, Armine F. Heinz, Charles McGuire, Eddy H. Metcalfe, Joseph L. Pitts, Frank J. Pyle, Jr., John Shen, Johnnye Taylor, and Alan J. Yehle, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on February 23, 1984.*

QUESTIONS PRESENTED FOR REVIEW

I. Whether the rights of Petitioners to be considered for temporary promotion in the Army on a fair and equitable

*Petitioners filed a timely Motion for Rehearing which was denied on March 27, 1984.

basis as set forth in 10 U.S.C. §3442(c) were denied when Department of the Army Reconstituted Selection Boards which reconsidered Petitioners for promotion removed promotion zone vacancies from consideration for which Petitioners could have otherwise competed.

II. Whether certain Department of the Army temporary Selection Boards convened in 1976 deprived Petitioners of their rights as set forth in 10 U.S.C. §§266, 277 and 3442(c) and Department of Defense Instruction 1205.4 because those Selection Boards failed to contain an appropriate number of Reserve officer members.

III. Whether Petitioners waived any entitlement to relief as accorded plaintiffs similarly situated in *Doyle v. United States*, 599 F.2d 984, *modified*, 609 F.2d 990 (Ct.Cl. 1979), *cert. denied*, 446 U.S. 982 (1980).

IV. Whether Petitioners were denied their right to promotion consideration on a fair and equitable basis as set forth in 10 U.S.C. §3442(c) because 1976 Temporary Selection Boards had before them records of Petitioners that contained evidence of their previous illegal nonselection that materially impacted upon their opportunity for selection.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The following were the Appellants in the proceeding below:

David Bockoven
John Bales
Ned Barker
Elwyn Beemer
Juan Cornejo
David Garvin
Rowe Haywood
Elijah Hicks
John Ketchum
LeRoy Lord
Angus Desveau
Alfred Dirska
Anthony Germana
Lawrence Henderson
Armine Heinz
James Bedell
Jay Allen Bogie
Diann Borgstrom
Don Bowles
Thomas Edelbach

Eugene McLaughlin	Vincent Hlinovsky
James Moulton	Charles McGuire
Joe Muckelroy	John Mullins
Billy Noland	Frank Pyle, Jr.
Joseph Pitts	Walter Ringler
John Shen	Johnnye Taylor
William Stewart	Meir Horvitz
Alan Yehle	Caleb Johnson
James Youndt	James Kemble
Edward Bast	Harry Kissinger
Dennis Brown	Eddy Metcalfe
William Conley	James Rosson
Wesley Scoates	Thomas Ward

John O. Marsh, Jr. and the United States were the Appellees in the proceeding below.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia is unreported. It appears in the Appendix at 3a-11a. The decision of the United States Court of Appeals for the District of Federal Circuit is reported at 727 F.2d 1558 (Fed.Cir. 1984).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 23, 1984. A timely motion for rehearing was filed by Petitioners on March 16, 1984 and denied by the United States Court of Appeals for the Federal Circuit on March 27, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 10:

§266 (a). Boards For Appointment, Promotion And Certain Other Purposes; Composition

Each Board convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense.

Aug. 10, 1956, c1041, 70A Stat. 11.

§227. Regular And Reserve Components: Discrimination Prohibited

Laws applying to both Regulars and Reserves shall be administered without discrimination —

(1) among Regulars;

(2) among Reserves; and

(3) between Regulars and Reserves.

Aug. 10, 1956, c1041, 70A Stat. 14.

§3442(c). Commissioned Officers; regular and reserve components; Appointment In Higher Grade.

Subject to subsections (a) and (b), a Regular commissioned officer, or a Reserve commissioned officer who is serving on active duty, may be appointed in a temporary grade that is equal to or higher than his Regular or Reserve grade, without vacating any other grade held by him. Under regulations to be prescribed by the Secretary, appointments made under this subsection shall be made on a fair and equitable basis. Selections shall be based upon ability and efficiency with regard being given to seniority and age.

Aug. 10, 1956, c1041, 70A Stat. 195.

Department of Defense Directives:

Department Directive 1205.4; Inclusion Of Reservists On Boards Considering Members Of Reserve Components Under §226 Of Title 10 U.S.C. (See Appendix 1a-2a)

Army Regulations:

Army Regulation 624-100, Promotion of Officers on Active Duty:

Section III, §16(b)(5)

> Whenever a zone of consideration includes non-Regular officers, selection boards will, where practicable, include at least one officer of the Reserve components.

STATEMENT OF THE CASE

This case concerns the implementation of a statutory scheme enacted by Congress to prevent discrimination in the promotion process against career Army Reserve officers who serve on active duty side-by-side with their Regular Army counter-parts. Petitioners are former active duty Army Reserve officers who served on active duty until the time they were released by reason of their twice nonselection for promotion to the next higher temporary grade (AUS) by Selection Boards that convened in 1974 and 1975, and 1975 and 1976.[1] The Selection Boards that did not select Petitioners failed to contain Reserve officer membership as required by Title 10 U.S.C. §266 and Department of Defense Instruction 1205.4.

The 1974 and 1975 Temporary Selection Boards failed to contain any Reserve officer members. The 1976 Selection Boards contained Reserve officer members, but that membership was not fairly proportionate to the number of Reserve officers considered for promotion. Each Petitioner was reconsidered for promotion by one or more Reconstituted

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[1]Petitioners Heinz, McGuire, Pyle, Henderson and Taylor were nonselected for promotion to the temporary grade of Major by the 1974 and 1975 Selection Boards. Petitioners Yehle, Shen, Pitts, Bast and Bockoven were nonselected by the 1975 and 1976 Temporary Lieutenant Colonel Selection Board. Petitioner Bales was nonselected by the 1975 and 1976 Temporary Major Selection Board; and Metcalfe by the Temporary CWO3 Boards in 1975 and 1976.

Selection Boards for 1974 and/or 1975, but not for 1976.

In response to applications for correction of military records filed by certain aggrieved Reserve officers in 1975, the Army Board for Correction of Military Records (ABCMR) found that the absence of Reserve officer members on the 1974 and 1975 Selection Boards was "an injustice" that deprived Petitioners of consideration in the manner intended by statute. The ABCMR recommended to the Secretary of the Army that new "Reconstituted" Selection Boards be convened to reconsider Petitioners, among others, for promotion and to report their findings to the ABCMR for such administrative action as the ABCMR might deem appropriate. The Reconstituted Selection Boards reduced the number of promotion vacancies by deleting a portion of the promotion vacancies from consideration thereby reducing the number of slots for which Petitioners could compete.

After the results of the Reconstituted Selection Boards were provided to the ABCMR, the ABCMR determined that the Petitioners had not been favorably considered and that the absence of Reserve officers on the original Selection Boards was "harmless error." Therefore, according to the ABCMR, Petitioners' original nonselections were neither erroneous nor unjust and their original nonselections were retroactively cured.

Reserve Officers Serving
On Extended Active Duty

Reserve and Regular Army officers serving on extended active duty competed against one another for temporary (AUS) promotions.[2] Accelerated promotion was provided by permitting selection from a "secondary zone." Each selection from the secondary zone removed a vacancy from the "primary" zone since both primary and secondary zone can-

[2]The Officer Personnel Act of 1947, 61 Stat. 906, 907, allowed the temporary promotion system by regulation. 10 U.S.C. §3442 (1976). That system was significantly altered in 1980 by the Defense Officer Personnel Management Act (DOPMA), Public Law 96-513, as amended by Public Law 97-22.

didates competed with one another whether Regular or Reserve. A Reserve Army officer was released from extended active duty if twice nonselected for promotion to the next higher temporary grade. A temporary nonselection of a Regular officer, on the other hand, had no consequence to his continued service. A Regular Army officer's continued service was conditioned upon his permanent promotion where he only competed with other Regular Army officers (RA), but not with Reserve officers. *Doyle v. United States*, 593 F.2d 964, 989-990, *opinion modified*, 609 F.2d 990 (Ct.Cl. 1979), *cert. denied*, 446 U.S. 982 (1980).

Recognizing the historical bias against Reserve officers serving on extended active duty and the fact that Reserve and Regular Army officers competed against one another for temporary promotion, Congress enacted the Armed Forces Reserve Act of 1952 ("the Act") "to correct existing defects in policies and practices relating to the Reserve and the individual members thereof." S.Rep.No. 1795, 82d Cong., 2d Sess. 2 (1952). The Act, referred to as the "Reserve Bill of Rights," created a statutory scheme to abolish institutional bias against Reserve officers serving on active duty. Section 254, codified at 10 U.S.C. §266 (1976), required that whenever Reserve and Regular officers competed for promotion, selection boards "shall contain an appropriate number of reserve officer members . . . ." The Act also required equal administration of the laws pertaining to both Regulars and Reserves. 10 U.S.C. §277. Temporary promotions were required to be made on a "fair and equitable basis." 10 U.S.C. §3442(c). Both the Department of Defense Instruction and army regulation implementing the Act emphasized the importance of fairly administering the selection process as it pertained to Reserves, requiring that Reserves must be fairly represented on selection boards whenever the zone of consideration included Reserve officers. Department of Defense Instruction 1205.4 and Army Regulation 624-100.

Contrary to statute, regulation and Department of Defense Instruction, the Department of the Army temporary selection boards for promotion to Major, Lieutenant Colonel and Chief Warrant Officer that convened during the years

1971 through 1975 contained no Reserve officer membership. From 1976 through 1981, the Department of the Army convened temporary promotion boards which contained Reserve officer membership but not proportionate to the number of Reserve officers being considered for promotion.

Administrative Proceedings

In the fall, 1975, some Reserve Army officers similarly situated who were twice nonselected for promotion to Major, Lieutenant Colonel, or Chief Warrant Officer in 1974 and 1975 by Selection Boards that failed to contain Reserve officer members filed applications for correction of military records with the ABCMR challenging their nonselection and pending release from active duty. 10 U.S.C. §1552.[3] The relief they requested included retention on active duty or restoration to active duty, as appropriate. Release from active duty of the affected Reserve officers followed, although the Secretary of the Army was informed of the defect in the composition of the original 1974 and 1975 selection boards in October, 1975. *Doyle v. United States*, 599 F.2d 984, 991 (Ct.Cl. 1979); *Dilley v. Alexander*, 603 F.2d 914, 918-919 (D.C. Cir. 1979).

Following a hearing in December, 1975, the ABCMR issued an interim decision that the absence of Reserve officers on the original 1974 and 1975 selection boards constituted an "injustice." 10 U.S.C. §1552. The ABCMR recommended reconsideration of the officers considered for promotion by the illegally constituted temporary selection boards that had convened in 1974 and 1975. The new consideration mechanism, the Reconstituted Selection Boards or "Relook Boards," were to act under the criteria and instructions in effect for the original 1974 and 1975 temporary selection

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[3]The administrative proceedings have been meticulously described in *Doyle v. United States*, 599 F.2d 984 (1979); and *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979). The District Court never concluded that Petitioners were parties to those proceedings although the administrative action taken was applicable to all officers in the affected year groups.

boards. These boards were to contain Reserve officer members and reconsider all primary zone candidates for promotion anew. The Secretary of the Army approved these findings on January 27, 1976 and directed the Army Chief of Staff for Personnel to convene Reconstituted Selection Boards in accordance with the recommendations of the ABCMR. The Secretary's directive did not reflect that the Reconstituted Selection Boards were to delete promotion vacancies in the secondary zone. In addition, no final action on pending applications for correction of military records would be taken until the completion of the Reconstituted Selection Board process and the results were communicated to the ABCMR "for appropriate action." *Dilley v. Alexander, supra* at 919.

The Reconstituted Selection Boards for 1974 and 1975 were convened during the Spring and Summer, 1976. The Reconstituted Selection Boards considered all primary zone officers who were originally considered for promotion in either 1974 and/or 1975. These boards contained Reserve officer members. However, the Reconstituted Selection Boards deleted the secondary zone promotion vacancies from consideration, effectively reducing the number of slots available for consideration. *Doyle v. United States*, 599 F.2d at 991-992.

After completion of the Reconstituted Selection Board process, the results of the boards were communicated to the ABCMR. The ABCMR then issued a final decision on the issue of the absence of Reserve officers on the 1974 and 1975 boards. The ABCMR ruled that those who were not favorably considered by the Reconstituted Selection Boards had not shown that they had been harmed by the failure of the original boards to include Reserve members. As to those officers who were selected by the Reconstituted Selection Boards, they were either restored to active duty, retained on active duty or retired, as appropriate. As to those officers who had been selected by the original boards but not the Reconstituted Selection Boards, they were allowed to retain their promotions.[4] *Id.*

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[4]Only officers who were favorably considered by the Reconstituted Selection Boards or who had filed applications to the ABCMR were notified of the Board's results.

Prior Judicial Determinations

Prior to their release in 1977, a group of Reserve officers nonselected in 1975 and 1976, filed an action for injunctive relief in the United States District Court for the District of Columbia challenging their original nonselection in 1975, their nonselection in 1976 and the results of the 1975 Reconstituted Selection Boards. *Dilley v. Alexander, supra.* The basis for their action was that the 1975 Reconstituted Selection Boards did not afford them a fair opportunity to compete for promotion vacancies by virtue of the deletion of the secondary zone. In addition, those Reserve officers contended that their records before the 1976 Selection Boards were improperly constituted to reflect their illegal nonselection by the original 1975 Selection Boards.[5]

The United States Court of Appeals for the District of Columbia Circuit determined that deletion of the secondary zone promotion vacancies from the Reconstituted Selection Board process substantially reduced the number of available promotion vacancies, failing to recreate the opportunity to be fairly promoted. Further, the results of the 1976 Selection Boards were invalidated because the officers' records before the 1976 Selection Boards improperly reflected their illegal 1975 nonselections. The court ordered those officers reinstated or retired with full back pay and allowances and appropriate correction of their records. *Dilley v. Alexander, supra.*[6]

Another group of Reserve officers who were nonselected in 1974 and 1975 and released from active duty in 1975 filed claims for back pay in the Court of Claims, asserting that deletion of the secondary zone promotion vacancies from the 1974 and 1975 Reconstituted Selection Boards deprived them of a fair opportunity for reconsideration. *Doyle v. United States, supra.* The United States Court of Claims ruled

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[5]The 1976 Temporary Selection Boards convened prior to the 1975 Reconstituted Selection Boards.

[6]Petitioners Yehle, Shen, Pitts, Bast, Bockoven, Bales and Metcalfe are in positions factually identical to the plaintiffs in *Dilley v. Alexander.*

that those plaintiffs, original applicants before the ABCMR, had waived their right to challenge deletion of the secondary zone by failing to assert their claim in a timely manner during the course of administrative proceedings before the ABCMR. However, the Court of Claims held that those officers could not have been legally released from active duty until completion of the Reconstituted Selection Board proceedings, and awarded them back pay and correction of records to reflect release at the point in time that the Reconstituted Selection Board process was completed. The Court of Claims rejected the Reconstituted Selection Board process as a test for "harm" or a retroactive cure for the original defective boards. *Doyle v. United States, supra.*[7]

Proceedings Below

In reliance upon *Dilley v. Alexander, supra* and *Doyle v. United States, supra*, Petitioners filed claims in the United States District Court for the District of Columbia challenging their release from active duty on the basis that the Reconstituted Selection Board process deleted the secondary zone promotion vacancies, thereby reducing the number of promotion vacancies for which they could compete. In addition, those Petitioners nonselected in 1975 and 1976 challenged their release from active duty in a commissioned status on the basis that the 1976 temporary selection boards had before them evidence indicating their illegal nonselection by the 1975 original temporary selection boards and that evidence impacted on their nonselection in 1976. Further, Petitioners in the 1975/1976 category challenged their 1976 nonselection because those selection boards although they contained Reserve officer membership, failed to contain an appropriate number of Reserve officers as required by law.

In response to cross-motions for summary judgment, the United States District Court for the District of Columbia

[7]Petitioners Heinz, McGuire, Pyle, Henderson and Taylor are in positions factually identical to the plaintiffs in *Doyle v. United States*.

rejected all of the Petitioners' claims. In its opinion, the District Court, without discussing the precedent of *Dilley v. Alexander, supra,* determined that the absence of secondary zone promotion slots had no significant impact upon Petitioners' opportunity for selection by the Reconstituted Selection Boards. Appendix at 5a-6a. The District Court conceded that as to those Petitioners in the 1975/76 category, there was evidence of nonselection before the 1976 Selection Boards, but it presumed that the board members acted in accordance with their instructions to ignore such evidence of previous nonselection. Appendix at 6a-7a. Finally, the District Court concluded that the matter of "appropriate number" of Reserve members on the 1976 Selection Boards was best left to the discretion of the Army and would not be disturbed by the court. Although the court acknowledged that the number of Reserve officers promoted in 1976 was disproportionately small compared to the number of Regular officers promoted and the representation of Reserve officers on the 1976 Selection Boards was disproportionately small compared to the number of Reserve officer members, the nonselected Reserve officers had failed to prove that, in fact, they were as well qualified and trained as those Regular officers who had been selected. Appendix at 7a-11a. The court also erroneously failed to grant Plaintiffs in the 1974/75 category *Doyle*-type relief.

Petitioners appealed to the United States Court of Appeals for the Federal Circuit requesting that the decision of the District Court be reversed on the following grounds: (1) the determination that the reservation of secondary zone promotion vacancies from the Reconstituted Selection Board was erroneous as a matter of law and fact as established in *Dilley v. Alexander, supra*; (2) the evidence of previous nonselection that went before the 1976 Selection Boards constituted a material error in Petitioners' files which impacted on their nonselection in 1976; (3) the District Court applied an erroneous standard in determining that Petitioners who were nonselected in 1976 were not harmed by the absence of an appropriate number of Reserve officers on the 1976 Selection Boards; and (4) the District Court erred in determining that the Reconstituted Selection

Boards could retroactively cure the defect in the original selection boards. *Doyle v. United States, supra.*

The Court of Appeals for the Federal Circuit affirmed the decision of the District Court. First, it determined that the Reconstituted Selection Board process was valid. Appendix at 16a-18a. Second, it concluded that proceedings before the 1976 Selection Boards were not fatally defective because Petitioners were not prejudiced by any information that may have been in their file indicating previous nonselection. Appendix at 19a-20a. The Court of Appeals for the Federal Circuit also determined that the Army had unbridled discretion to determine what constituted an appropriate number of Reserve officers necessary to satisfy the requirements of 10 U.S.C. §266. Appendix at 20a-25a. Finally, the court held that Petitioners had waived their entitlement to *Doyle*-type relief. Appendix at 25a-26a.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFECTS PENDING CASES INVOLVING OTHER RESERVE OFFICERS SIMILARLY SITUATED

For the period 1971 through 1975, the Department of the Army convened promotion boards which considered Reserve officers for promotion to the next higher temporary grade. These selection boards failed to contain Reserve officer membership as required by statute and governing regulation. For the period 1976 through 1981, the Department of the Army convened temporary selection boards which although containing Reserve officer membership, did not contained Reserve officer membership which was roughly proportionate to the Reserve officer population being considered for promotion. Thousands of Reserve Army officers were released from active duty as a result of these selection boards. Many of these officers have claims now pending in the United States Claims Court, which actions have been

suspended pending a final resolution of the issues presented in this litigation.[8]

In all cases pending before the United States Claims Court, those plaintiffs as well as Petitioners seek reinstatement to active duty together with active duty pay and allowances in the grade held at the time of their release from active duty to the date of reinstatement. In some cases, claimants would be entitled to retire by reason of constructive active duty credit for the period from the date of their erroneous release from active duty to the date of reinstatement.

In total, the pending litigation affected by this case involves over 100 former active duty officers.

2. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IS IN DIRECT CONFLICT WITH THE CONCURRENT DECISION IN *DILLEY V. ALEXANDER*, 603 F.2d 914 (D.C. CIR. 1979).

In *Dilley v. Alexander, supra,* officers nonselected in 1975 and 1976 filed suit in the United States District Court for

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[8]The related cases containing the same or similar issues presented to the Court in this case are presently pending before the United States Claims Court: *Ackerman v. United States*, No. 9-81C; *Alsup, et al. v. United States*, No. 528-81C; *Autrey v. United States*, No. 556-82C; *Baker v. United States*, No. 372-83C; *Bailey v. United States*, No. 591-82C; *Baird v. United States*, No. 475-82C; *Barry v. United States*, No. 445-79C; *Bath v. United States*, No. 648-82C; *Belanger v. United States*, No. 648-82C; *Billingsley v. United States*, No. 303-83C; *Blevins v. United States*, No. 649-82C; *Buggs v. United States*, No. 183-81C; *Brown v. United States*, No. 483-81C; *Burns v. United States*, No. 599-81C; *Cooper v. United States*, No. 538-82C; *Drew v. United States*, No. 664-82C; *Duncan, et al. v. United States*, No. 493-77; *Fisher v. United States*, No. 313-83C; *Franklin v. United States*, No. 302-82C; *Geilear v. United States*, No. 665-82C; *Gibes v. United States*, No. 193-83C; *Gilman v. United States*, No. 401-81C; *Gonzales, et al. v. United States*, No. 522-77; *Gray v. United States*, No. 34-83C; *Hill v. United States*, No. 659-82C; *Hunt v. United States*, No. 576-80C; *Jacobs v. United States*, No. 361-82C; *Johnson v. United States*, No. 412-81C; *Keenan v. United States*, No. 25-83C; *Lawson v. United States*, No. 620-82C; *Likens v. United States*, No. 346-79C; *Lowe, et al. v.*

the District of Columbia prior to their release from active duty. There, the United States Court of Appeals for the District of Columbia Circuit determined:

> "The Relook [Reconstituted] Boards had substantially fewer promotion vacancies to fill than the 1975 boards. The Relook Boards were to reconsider only primary zone candidates who had been reviewed by the 1975 boards. Although primary zone candidates received some preferential treatment in the promotion process owing to the Secretary's limitations on the number of secondary zone officers who can be promoted, candidates from both zones compete for the same slots. Hence, the selection of a candidate from the secondary zone effectively displaces a candidate from the primary zone. By limiting the Relook Boards' duty to reconsider the primary zone alone, the Corrections Board eliminated a total of 664 promotion vacancies for which appellants could have otherwise competed. This reduction in the number of available slots materially affected appellants' prospects for promotion before the Relook

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United States, No. 629-82C; *McCarron v. United States*, No. 561-81C; *McCarthy v. United States*, No. 525-77; *J. McKnight v. United States*, No. 515-81C; *M. McKnight v. United States*, No. 323-79C; *McNiff v. United States*, No. 479-82C; *F. Meyer v. United States*, No. 62-83C; *R. Meyer v. United States*, No. 584-82C; *Nelson v. United States*, No. 585-82C; *Nicholson v. United States*, No. 64-83C; *Piercey v. United States*, No. 55-83C; *Pippin v. United States*, No. 358-79C; *Ray v. United States*, No. 23-83C; *Rider v. United States*, No. 295-83C; *Shepherd v. United States*, No. 597-82C; *Slauson v. United States*, No. 99-83C; *Stratiff v. United States*, No. 488-81C; *Teofilak v. United States*, No. 621-82C; *Thomas, et al. v. United States*, No. 24-83C; *Waggoner v. United States*, No. 389-83C; *Wallace v. United States*, No. 22-83C; *Warnicky v. United States*, No. 446-81C; *Weeks v. United States*, No. 213-82C; *West v. United States*, No. 56-83C.

In addition, there is pending in the United States Court of Appeals for the District of Columbia Circuit, *Teeter v. Marsh*, No. 84-5200 and *Poklemba v. Marsh*, No. 84-5209, consolidated appeals, challenging the composition of 1979 and 1980 Temporary Selections Boards. Briefing in these appeals concludes on August 8, 1984. Oral argument, if granted, will be scheduled for the Fall, 1984.

> Boards and deprived them of substantial rights guaranteed them by the statute."
>
> *Id.* at 924-925

In connection with the question of whether Petitioners were harmed by evidence of nonselection in their file at the time they were considered by the 1976 Selection Board, the court in *Dilley v. Alexander* reached a result in direct conflict with that reached by the Court of Appeals for the Federal Circuit:

> "... Between the time of the initial Corrections Board recommendation and the implementation of that recommendation, their establishment of the Relook Boards, appellants were considered for promotion by the 1976 boards. These 1976 boards, which did not select appellants for promotion, had before them records that reflected appellants' nonselection in 1975 even though appellants had never been lawfully passed over. Thus, establishment of the Relook Boards had no affect on appellants' status before the 1976 boards, though it should have been if appellants were to be placed in the same position that they were in before 1975."
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> *Dilley v. Alexander, supra* at 924.

As the United States Court of Appeals for the District of Columbia Circuit further noted:

> "... This error [the error of the information before the 1976 boards which reflected Petitioners' illegal nonselection in 1975] was not insignificant, for the promotion prospects of an officer already once passed over by a selection board are narrow."
>
> *Dilley v. Alexander, supra* at n. 21.

Consequently, there is a conflict in analysis and result between this case and *Dilley v. Alexander*. It is not possible for the individuals affected to reconcile the conflicts in these decisions and the two controlling results create an injustice of serious proportion in light of cases presently pending in the Claims Court and the United States Court of Appeals for

the District of Columbia Circuit. These conflicts provide sufficient basis for this Court to review the proceedings and to issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit to resolve the conflict.

3. THE DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISIONS IN *STEWART V. UNITED STATES*, 611 F.2d 1356 (CT.CL. 1979), AND *HORN V. UNITED STATES*, 671 F.2d 1328 (CT.CL. 1982), DECIDED BY THE UNITED STATES COURT OF CLAIMS, THE PREDECESSOR COURT TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982), the Federal Circuit adopted the decisions of its predecessor courts as precedent and controlling. Nevertheless, it ignored prior decisions of the Court of Claims in reaching its decision in this case.

In *Stewart v. United States*, 611 F.2d 1356 (Ct.Cl. 1979), the Court of Claims determined that one Reserve officer serving on a Department of the Air Force selection board out of twenty-five members was not, as a matter of law, an appropriate number of Reserve officers as required by law. The Court of Claims in *Stewart* determined that failure of a selection board to have an appropriate number of Reserve officers thereon constituted a legal error for which there was no requirement that an aggrieved plaintiff show that he had been harmed thereby. Further, *Stewart v. United States* concluded that the requirement of an appropriate number of Reserve officers necessitated "rough equality" in the proportion of Reserve officers being considered vis-a-vis the number of Reserve officers serving as members of the board. It shifted the burden from the plaintiff to the service to "make a convincing showing that the statute, regulations and published directives were complied with [by the 1976 selection boards] at those particular times and that there was no evasion of the legal procedural requirements that has led to harmful error." *Stewart v. United States*, 611 F.2d at 1361.

Although Respondents made no such showing in these cases, the United States Court of Appeals for the Federal Circuit determined that the Secretary of the Army was im-

bued with broad discretion to determine what constituted an appropriate number of Reserve officers even though the number of Reserve officers being considered was grossly disproportionate to the percentage of Reserve officers serving as members on the board.[9] In effect, the Court of Appeals for the Federal Circuit overruled its predecessor court, the Court of Claims in *Stewart v. United States*. It relegated the Court of Claims' test of "rough equality" to "merely passing statements made in support of its conclusion." Appendix at 24a. It further shifted the burden of proof to the Petitioners to show that the number of Reserve officers serving on the selection boards in 1976 was not appropriate, in effect rejecting a long line of cases that had rejected that a claimant who challenged the composition of a Selection Board be required to show that the error was prejudicial. *Stewart v. United States, supra; Dilley v. Alexander, supra; Henderson v. United States*, 175 Ct.Cl. 690, *cert. denied*, 386 U.S. 1016 (1967); *Ricker v. United States*, 396 F.2d 454, (Ct.Cl. 1968); *Doyle v. United States, supra*. Appendix at 25a.

The United States Court of Appeals for the Federal Circuit also ignored the recent decision of the United States Court of Claims, its predecessor court, in *Horn v. United States*, 671 F.2d 1328 (Ct.Cl. 1982) where the Court of Claims emphasized the impact of prejudicial evidence of prior nonselection in an officer's file and cited with approval *Dilley v. Alexander:*

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[9]The following demonstrates the disparity between Reserve membership and Reserve officers being considered on the 1976 Selection Boards:

1976 Major (AUS)

% of Reserves considered	% of Reserve membership
52.5%	20%

1976 Lt. Col. (AUS)

% of Reserves considered	% of Reserve membership
33%	13%

1976 CWO4 (AUS)

% of Reserves considered	% of Reserve membership
56%	20%

See Appendix at 21a.

"Finally, we consider the validity of plaintiff's nonselection by the June 6, 1978 statutory selection board. Although it was legally constituted, the board had before it records showing that plaintiff had not been selected by the board which convened April 5, 1977. The fact that plaintiff had not been selected by the April 5, 1977 board should not have been included in plaintiff's records, because that non-selection was based on records that contained material errors. As this court squarely held in *Riley v. United States* [citation omitted], the inclusion of the prior non-selection record, under such circumstances constituted prejudicial error which renders the decision of the June 6, 1978 selection board invalid. To the same effect, see *Dilley v. Alexander* [citation omitted].

Plaintiff declares and defendant does not dispute, that plaintiff's opportunity for selection when initially considered for promotion in 1977 was 67%. However, as a previously nonselected officer, his chance for promotion in 1978 was only 13%. Therefore, it cannot be said that the inclusion in the record of the prior nonselection was a mere harmless error. 'The parties and even the correction board acknowledged that previous passovers may detrimentally affect promotion opportunities.' *Sanders v. United States, supra* at 312."

Id. at 1331-1332.

Therefore, there is a clear conflict between the Court of Appeals for the Federal Circuit's decision in this case and its predecessor court, the Court of Claims, in *Stewart v. United States* and *Horn v. United States*. This conflict cannot be resolved absent the grant of a petition for writ of certiorari.

4. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IGNORED ITS PRECEDENT IN *DOYLE V. UNITED STATES, SUPRA*, AND ERRONEOUSLY CONCLUDED THAT PETITIONERS SIMILARLY SITUATED HAD WAIVED ENTITLEMENT FOR *DOYLE*-TYPE RELIEF

In both *Doyle v. United States*, and *Dilley v. Alexander*, the courts rejected the notion that the Reconstituted Selection

Boards could retroactively validate the defective selection boards that failed to contain Reserve officer members. The District Court ignored both *Dilley* and *Doyle* and erroneously concluded that the defect in the original selection board process could be retroactively cured. The District Court never treated the issues of whether Petitioners similarly situated were entitled to relief as granted to the plaintiffs in *Doyle*. The Court of Appeals acknowledged the District Court's failure to address the point in its opinion. Appendix at 25a. Petitioners had referred to the District Court's omission in their briefs alluding to both the *Dilley* and *Doyle* decisions as well as the subsequent unreported decision in *Southall v. United States*, C.A. No. 81-54 (D.D.C. January 12, 1982) wherein plaintiffs had also sought relief beyond *Doyle* but the Court was constrained to limit plaintiff's recovery to that granted in *Doyle*. Further, Petitioners had advised the Court of Appeals of the Federal Circuit that the Army administratively was prepared to grant *Doyle*-type relief to those Petitioners who were similarly situated.

Nevertheless, the Court of Appeals for the Federal Circuit erroneously concluded that Petitioner had waived *Doyle*-type relief. Appendix at 26a. It cited no authority for its legal conclusion. Further, it misconstrued the Petitioner's position advanced in the District Court where the Respondents tenaciously clung to the notion that the Reconstituted Selection Boards could retroactively cure the defect in the original selection board process. If the Court of Appeals for the Federal Circuit was constrained not to adopt Petitioners' position that the Reconstituted Selection Board process was invalid, it was nonetheless compelled to follow its holding in *Doyle*. This is even more significant in light of the fact that the Court of Claims had failed to clearly sustain the Reconstituted Selection Board process in *Doyle* finding instead that plaintiffs had waived their challenge to that claim. *Doyle v. United States, supra* at 984.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to

review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF DEFENSE INSTRUCTION

Subject: Inclusion of Reservists on Board Considering Members of Reserve Components under Section 266 of Title 10, U.S. Code

Reference: (a) DoD directive 1205.4, relative to same subject, November 26, 1952 (hereby cancelled)

Purpose

To provide basic guidance to the military departments in carrying out the provision of Section 266 of Title 10, U.S. Code, requiring inclusion of appropriate numbers of members from the reserve components on all boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components.

Cancellation

Reference (a) is hereby superseded and cancelled.

Policy

A. All boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components shall be constituted as prescribed by the appropriate Secretary, and shall include appropriate numbers of members from the reserve components.

B. The intent of the Congress in this Section is clear, that a member of a reserve component who is the subject of any of the indicated board actions shall be assured a fair representation of reserve membership on the board. The Secretaries of the military departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve, which may be considered by the board, provide in the membership of the indicated boards, to the fullest practicable extent, a fair and adequate representation of members from the reserve components.

Implementing Directives

It is requested that the Assistant Secretary of Defense (Manpower, Personnel and Reserve) be made an information addressee on implementing departmental directives relating to this policy.

Signature not legible

Assistant Secretary of Defense
(Manpower, Personnel and
Reserve)

United States District Court for the District of Columbia

No. 80-0417

David N. Bockoven, et al., Plaintiffs,
v.
John O. Marsh, Jr., et al., Defendants.

MEMORANDUM

These twenty cases, which are presently before the Court on cross-motions for summary judgment, involve the claims of a number of former United States Army reserve officers, who challenge the procedures under which the Army decided not to promote them.[1] Plaintiffs' failure to achieve promotion twice resulted in their involuntary release from active duty. Plaintiffs, as a group, assert (1) that certain promotion selection boards meeting in 1972, 1974, and 1975 were invalid because they did not include any reserve officers among their members; (2) that the "Relook Boards" convened by defendant to reconsider the results of the invalid boards were also invalid, in that they were only permitted to make selections for "primary zone" slots; (3) that the Relook Boards were invalid because they had before them evidence of the results of the invalid boards; (4) that the Relook Boards were invalid because they had insufficient reserve officer membership; and finally (5) that the 1976 promotion selection boards were also invalid in that they failed to include an appropriate number of reserve officers as board members.

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[1] A full description of the basic Army promotion procedures, including the Relook procedure employed in these cases, is given in the Court of Claims opinion in *Doyle v. United States*, 599 F.2d 984 (Ct. Cl. 1979).

Different groups of plaintiffs raise different combinations of these claims, according to the circumstances of the particular boards that failed to promote them. However, none of the plaintiffs in these cases claim any individualized insufficiencies in the nonselection for promotion by the challenged boards, such as incomplete records or consideration of inappropriate criteria in their individual cases. It is therefore appropriate to consider the claims of the group as a whole, and each plaintiff's claim that his nonpromotion and subsequent involuntary release from active duty was unlawful is wholly dependant upon the group's challenge to the validity of the selection boards that made those decisions.

Defendants do not dispute plaintiffs' claim that the original promotion selection boards convened in 1972, 1974, and 1975 were invalid, in that none of the officers serving on those boards had reserve status. This was a clear violation of 10 U.S.C. § 266, which requires any board convened to consider the promotion of reserve officers to include "an appropriate number of Reserves." It is uncontroverted that zero cannot be an appropriate number in this situation. *Doyle v. United States*, 599 F.2d 984, 992 (Ct. Cl. 1979).

There are therefore two basic questions now before the Court: (1) Was the remedy designed by defendant to compensate for its admitted errors in 1972, 1974, and 1975 adequate? and (2) Did the Secretary of the Army abuse his discretion in setting the number of reserve officers that served on the 1976 boards?

When some reserve officers who had been denied promotions in 1972, 1974, and 1975 complained about those denials to the Army Board for Correction of Military Records (ABCMR), the Army convened a series of Reconstituted Selection Boards ("Relook Boards") to reconsider the pool of eligible promotion candidates for those years and to make an independent determination of who should be promoted. All those officers selected by the original boards were permitted to retain their promotions, regardless of whether the Relook Boards also selected them. However, those officers who were rejected by the original boards but were chosen by the new boards were given the appropriate promotions. The plaintiffs in these cases are all officers who were not selected

for promotion by either the original boards or the Relook Boards.

Plaintiffs challenge a number of aspects of the relook procedure. It must be noted at the outset that, since the Army has its own administrative process (the ABCMR) for the resolution of errors in its promotion system, the Court's scope of review of the adequacy of the remedy designed by that process is limited to a determination of whether the Secretary's action was arbitrary and capricious or failed to accord plaintiffs due process. There is no absolute requirement that the remedy be *perfect*; it need only be adequate to provide plaintiffs a reasonable opportunity to be restored to the same position that they would have been in had the original error not been committed. *Dilley v. Alexander*, 603. F.2d 914 (D.C. Cir. 1979).

Plaintiffs' first complaint about the Relook procedure is that the Relook Boards were permitted to consider only so-called "primary zone" vacancies.[2] Since all officers who challenged the promotion boards were in the primary zone (the groups of officers meeting the minimum qualifications for promotion), the Relook Boards were only authorized to reconsider primary zone promotions. Plaintiffs assert that this limitation was improper, because the Relook Boards could conceivably have awarded a smaller proportion of the promotions to secondary zone officers,[3] thus making more slots available to the primary zone.

The speculation that the Relook Boards might have reduced the secondary zone allotment if permitted to do so is

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[2] In *Doyle*, the Court of Claims held that the plaintiffs had waived this challenge to the Relook Boards, since they had failed to bring it up before the ABCMR. The waiver argument is renewed in these cases by defendant; however, the Court does not need to reach this issue, since it finds that the restriction of the Relook procedure to primary zone slots was valid in any event.

[3] Secondary zone officers are those who, because of exceptional records or other qualifications, are recommended for early consideration for promotion. The primary zone and secondary zone compete for the same limited number of promotion slots, with a limit on the number of secondary zone promotions that may be made by any one board. As a practical matter, the maximum number of secondary zone promotions permitted are nearly always recommended by the selection boards.

hardly credible. Since the secondary zone is by definition composed of officers of exceptionally high qualifications, it seems extremely unlikely that plaintiffs, who are at best among the less qualified reserve officers,[4] would have been viewed as more desirable candidates for promotion. This is especially true in light of considerable evidence of a general presumption that all secondary zone selections permitted would be made. *See Doyle*, 599 F.2d at 999.

Even more important, however, is the fact that primary zone officers did in fact receive close to 100% of the promotion slots originally authorized to the board. When the selections of the original boards (none of which were disturbed) are combined with the additional selections of the Relook Boards, the total number of primary zone selections comes close to (and in some cases even exceeds) the total number of promotion slots originally authorized. In this situation, the adequacy of the remedy, even in the absence of reconsideration of the secondary zone, is apparent.[5]

Plaintiffs further challenge the adequacy of the Relook Boards in that they claim that those boards had before them evidence of the fact that the original, invalid boards had not selected them. This evidence, plaintiffs submit, prejudiced their chances of promotion by the Relook Boards.

All documents concerning or mentioning the results of the original boards were removed from the files submitted to the Relook Boards. However, some of the files included documents that had been stamped with a special pentagonal

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[4] The most qualified reserve officers were presumably the ones who were promoted.

[5] In fact, had the Army instituted a remedy that *completely* duplicated its original procedure, primary zone officers as a group would most probably have received singificantly fewer promotions than they received under the remedy actually used. A total duplication would have required not only reconsideration of the secondary zone, but total reconsideration of the primary zone as well, with only those officers selected by the Relook Boards permitted promotions. Under that procedure, the primary zone group would most likely have received none of the slots originally allocated to the secondary zone, and they would have lost all the promotion selections made by the original boards but not duplicated by the Relook Boards.

stamp.[6] Plaintiffs assert that some of the officers on the boards might have been aware of the meaning of the code number on this particular stamp, which indicated that the file had been before a previous board.

There is a strong presumption of regularity in proceedings of this kind. *Rogers v. United States*, 270 U.S. 154 (1926). The officers serving on the board were under direct orders not to take into consideration any knowledge they might have had about a particular officer's nonselection by the earlier board. Moreover, all members of the selection boards were required to take a special oath to follow strictly the instructions provided the board about the appropriate criteria for selection. Thus, even were some of the officers on the boards able to decipher the coded stamp, they were fully aware that they were not to take that information into consideration in making their decisions.

When inadmissible evidence is inadvertently presented to a jury, it is in most cases considered sufficient to cure the error if the judge instructs the jurors to disregard that information. If jurors can be trusted to disregard improperly revealed information, then surely highly trained and disciplined Army officers should be presumed to have followed direct orders to disregard any information not properly before them in making their selection decisions. Absent any evidence from plaintiffs that they were in fact prejudiced by the presence of the stamp on their records,[7] therefore, it must be presumed that the information that the stamp could have provided was not considered by the boards.

Plaintiffs' final challenge to the Relook Boards concerns the number of Reserve officers on those boards. Plaintiffs

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[6] Defendant does not concede that documents bearing this stamp were in fact provided to the boards; however for the purposes of this motion it will be assumed that they were.

[7] The fact that at least some officers whose records bore that stamp were not prejudiced by it is made clear by the fact that some of those officers were in fact selected by the Relook Boards and promoted. Had the Relook Boards been influenced by knowledge of the original boards, their own results would have presumably matched those of the original boards much more closely than they did.

also challenge the results of the 1976 promotion boards on this ground. Plaintiffs assert that, even though these boards had reserve officer representation, that representation was insufficient to safeguard their rights under 10 U.S.C. § 266.[8] Again, insofar as this challenge is raised with regard to the Relook Boards, the Court's scope of review is limited to examination of the adequacy of the Relook remedy. However, the Court's scope of review in considering the challenge to the 1976 boards is also extremely limited.

Plaintiffs assert, without contradiction from defendant, that the principal purpose of the requirement of reserve officer membership on promotion selection boards was to ensure that reserve officers would not be discriminated against in the promotion process. This antidiscrimination policy, which was specifically recognized by Congress when it enacted § 266, is certainly important. However, it does not justify the high level of scrutiny of the Army's internal personnel decisions that plaintiffs appear to seek. Army reserve officers are not a "suspect class;" nor is promotion in the Army a fundamental right. Quite the opposite is true. Both Congress and the Executive have traditionally enjoyed considerable discretion in their administration of the military. *Rostker v. Goldberg*, 101 S. Ct. 2646 (1981); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Orloff v. Willoughby*, 345 U.S. 83 (1953). As the Supreme Court has said,

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility of setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized communi-

[8]With the exception of small boards considering only small groups of promotion candidates, which generally had one reserve officer member out of five or six, most of these boards had two or three reserve members. In the case of each of the boards challenged by plaintiffs, the proportion of reserve officers on the board was less than that in the pool of promotion candidates being considered by the board.

> ty governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters.

345 U.S. at 93-94. *See also Turner v. Department of Army*, 447 F. Supp. 1207, 1212 (D.D.C. 1978), *aff'd*, 593 F.2d 1372 (D.C. Cir. 1979).

Courts have been extremely reluctant to interfere with essentially military decisions, even when those decisions have involved matters that would normally involve a heightened level of judicial scrutiny. *See, e.g., Rostker, supra* (upholding draft registration statute applicable only to males); *Ballard, supra* (upholding differential tenure rules for male and female naval officers).

The decision about how many reserve officers must be appointed to a promotion selection board has not been committed totally to the discretion of the Secretary in the sense that there is no judicial review of the Secretary's decision. The statute, 10 U.S.C. § 266 does provide some "law to apply," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in that it requires "an appropriate number" of reserve officers to be appointed to each board. However, the scope of review of this decision remains limited.

The legislative history of the statute is quite sketchy, but what there is makes it clear that Congress considered fixing some specific ratio for reserve officer membership but rejected that alternative in favor of the language used "so as to provide more flexibility by allowing the Reserve representation on such boards to be established by regulation." Conf. Rep. No. 2445, 82d Cong., 2d Sess. (1952). The Senate Report states that "the proportion of Reserve officers on the board should be roughly equal to the proportion of Reserves being considered." S. Rep. No. 1066, 82d Cong., 2d Sess. (1952). However, this "roughly equal" language was not included in the statute, which states only that

> "Each board convened for the . . . promotion . . . of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards of policies prescribed by the Secretary of Defense."

10 U.S.C. § 266. The clear intent of Congress was to leave the interpretation of this concept primarily up to the Secretary in promulgating regulations on the subject. The relevant regulation, Department of Defense Instruction 1205.4 (June 23, 1959), states that

> The intent of Congress in this Section is clear, that a member of a reserve component . . . shall be assured a fair representation of reserve membership on the board. The secretaries of the military departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve, which may be considered by the board, provide in the membership of the indicated boards, to the fullest practicable extent, a fair and adequate representation of members from the reserve components.

The court cannot say that this interpretation of the statute is arbitrary and capricious or contrary to the statute itself. The adequacy of the reserve officer membership on the boards, therefore, must be measured in terms of fairness to the reserve officers being considered.

Plaintiffs have shown no reason why the numbers of reserve officers appointed to the boards that considered them were unfairly small and therefore violated the regulation. Their only proposed indicia of unfairness are the disparaties between the rates of promotion of regular and reserve officers. In the cases of all selection boards at issue in these cases, the rate of selection of reserve officers was lower (in many cases by a large margin) than that for regular officers. However, these numbers, taken alone, are not necessarily suspicious. Regular officers, by virtue of special training and other qualifications (such as education at West Point), would be expected to have a higher promotion rate than their reserve colleagues.[9] Even in a title VII case, where the plaintiff class is given special statutory protections and a relatively light burden of proof in establishing a prima facie

[9] For example, as counsel for plaintiffs admitted at the hearing, the secondary zone of candidates for early promotion, which includes many of the most highly qualified officers in the Army, is composed almost entirely of regular officers.

case, plaintiffs are required to show more than mere gross statistical disparaties to establish discrimination. They must also show basic equality of *qualifications*, i.e., that the two groups being treated differently are not in fact different. *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982).

In this case, plaintiffs have neither presented evidence nor suggested an ability to present evidence that would show that they were in fact as well qualified as the regular officers who were promoted.[10] Plaintiffs' only claim is that the reserve representation on the boards was *per se* insufficient. In this situation, the Court can find no indication of unfairness to plaintiffs that would justify disturbing the results of the selection board's deliberations. Unfairness cannot be presumed as a matter of law in a situation when the clear minimum requirement of the statute, i.e., *some* more-than-token reserve officer membership on the boards, *Doyle v. United States*, *supra; Stewart v. United States* , 611 F.2d 1356 (Ct. Cl. 1979), has been met.

Accordingly, since the Court finds that the Relook Boards convened to reconsider the 1972, 1974, and 1975 promotions provided an adequate remedy to those reserve officers who were not selected by the original boards, and since the Court further finds that the Secretary did not abuse his discretion in appointing reserve officers to the 1976 selection boards, an accompanying order will deny plaintiffs' motion for summary judgment and will grant defendant's motion.

Date: March 28, 1983

/s/ Louis Oberdorfer

UNITED STATES DISTRICT JUDGE

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[10] Even if such evidence could be presented, the Court would still be unwilling to substitute its judgment for that of the more expert military authorities on the subject of who was or was not qualified for promotion. If there were a strong showing of equal qualification, however, the Court would have considered a remand to the Secretary for reconsideration of the issue of reserve representation on the board in light of a substantial question of the fairness of the board results.

In The United States Court of Appeals for the Federal Circuit

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Nos. 83-1032 through 83-1051

David N. Bockoven, et al.

v.

John O. Marsh, et al.

Decided: February 23, 1984

Before FRIEDMAN, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and BALDWIN, *Circuit Judge.*

FRIEDMAN, *Circuit Judge.*

This is an appeal from a judgment of the United States District Court for the District of Columbia granting the appellees' motion for summary judgment in a suit challenging the release from active duty of the appellant Army Reserve officers after they had been twice passed over for promotion by Army selection boards. We affirm.

I

This case is a sequel to the decision of the Court of Claims in *Doyle v. United States,* 599 F.2d 984 (Ct. Cl.), *modified,* 609 F.2d 990 (1979), *cert. denied,* 446 U.S. 82 (1980). In *Doyle,* the court invalidated certain aspects of the procedures the Army had followed in considering the promotion of Reserve officers. The Army's system for promoting Reserve officers is fully explained in *Doyle,* and we here summarize those procedures and practices only to the extent necessary to understand the issues here. Further details involving the application of those procedures to these particular cases are set forth in the discussion of the grounds upon which the appellants challenge their release from active duty.

A. Army Reserve officers on active duty are considered for temporary promotion after they have served stated times in their temporary rank. Army selection boards consider for promotion at the same time all eligible officers of the same rank. Separate boards are convened to consider officers of each rank, *e.g.*, all majors eligible for promotion to lieutenant colonel. An officer who is not promoted is considered again by the next convened board, usually in the following year. An Army Reserve officer who is passed over for temporary promotion by two successive selection boards is released from active duty. *See* Army Regulation 635-100, ¶ 3-65a (1982).

Each of the appellants was an Army Reserve officer on active duty who was passed over twice for temporary promotion by Army selection boards. The officers then either were released from active duty or slated to be released. One of the appellants was passed over by selection boards in 1972 and 1974. A number of appellants were passed over by boards in 1974 and 1975. A third group of appellants was passed over by boards in 1975 and 1976.

Following the decisions of the 1972, 1974, and 1975 boards, Reserve officers whom the boards had failed to promote discovered that some of the boards had not included any Reserve members. This violated the requirement in 10 U.S.C. § 266(a) (1976) that a board considering the temporary promotion of Reserve officers "shall include an appropriate number of Reserves . . . ." Those officers applied to the Army Board for the Correction of Military Records (Correction Board) to set aside their release from active duty on the ground that the absence of reservists on the boards vitiated the boards' actions. *Doyle*, 599 F.2d at 991.

The Correction Board held that the absence of reservists resulted in an "injustice" to the passed-over officers. It recommended to the Secretary of the Army that new selection boards containing an appropriate number of reservists be appointed to reconsider all officers who had been considered for promotion by the defective 1972, 1974, and 1975 boards, that in reconsidering the promotion of those officers the new boards follow the same principles and practices that the old

boards had followed (with one exception discussed below), and that the records of all those officers be reconstituted as they were at the time the boards originally sat. *Id.* The Secretary of the Army approved the recommendation, and the new boards, known as "relook boards," were convened in 1976.

The one respect in which the relook board proceedings differed from those before the earlier boards related to the treatment of officers in the "secondary zone." The officers the original selection boards considered for promotion consisted of those in both the "primary" and "secondary" zones. Officers who had served the time in grade after which a double pass-over would result in release from active duty are in the "primary zone." Officers in the "secondary zone" are outstanding officers who have served less time in grade and generally are younger than those in the primary zone. Unlike officers in the primary zone, the pass-over of an officer in the secondary zone is not treated as one of the two pass-overs that mandate release from active duty.

The Secretary of the Army specifies the total number of officers each board is to promote, based upon the Army's anticipated officer needs in that grade for the next year, and the number it may select from the secondary zone. In 1974 and 1975, all the selection boards selected the maximum number of offficers they were permitted to pick from the secondary zone.

All of the appellants were in the primary zone when they were twice passed over.

The relook boards, unlike the original boards, did not consider any officers from the secondary zone, but limited their reconsideration to those in the primary zone. The relook boards selected the same number of officers in the primary zone that the original board had selected. A significant number of the officers the relook boards selected had been passed over by the original boards, and a number of officers the original boards had selected were passed over by the relook boards. The promotions of officers selected by the original boards remained effective despite subsequent pass-overs of the same officers by the relook boards.

The relook boards twice considered for promotion those appellants who had been passed over by the 1972 and 1974 boards or the 1974 and 1975 boards, but did not select them for promotion.

As noted, some of the appellants had been considered only by one original board that had no reservists, the 1975 board. Prior to the convening of the relook boards in 1976, those appellants were considered by the 1976 regular selection boards, which contained reservists. (As discussed in part IV, the appellants contend that the 1976 boards did not have an appropriate number of reservists.) The 1976 board passed over those appellants as the 1975 relook board did thereafter.

B. The appellants filed this case in 1980. They challenged their release from active duty on various grounds, of which they assert only three in this court.

(1) The 1972, 1974, and 1975 relook boards were invalid because they did not consider officers from the secondary zone. According to the appellants, this denied them the opportunities for promotion they would have had before the original boards if those boards had been validly constituted. Their theory is that the relook boards might not have selected the maximum number of officers from the secondary zone, which would have created additional promotion positions for primary zone officers.

(2) The 1976 board improperly considered evidence that the appellants had been passed over by the original 1975 board.

(3) The 1976 board was improperly constituted because it did not contain "an appropriate number" of reservists, as the statute required.

The relief the appellants sought was a declaratory judgment that their nonselection for promotion and their release from active duty were "void" and "illegal," an order restoring them to active duty and providing for reconsideration of their promotion by "two duly constituted promotion selection boards in the ordinary course of events," the correction of their records to void the pass-overs and releases from active duty, and an award of backpay and allowances not to exceed $10,000.

Both sides moved for summary judgment. The district court granted the government's motion and denied the appellants' motion. In an accompanying opinion, it discussed and rejected these contentions. The court held:

(1) "The speculation that the Relook Boards might have reduced the secondary zone allotment if permitted to do so is hardly credible";

(2) Any information the 1976 board may have had concerning the appellant's prior pass-over was cured by the fact that the members of the board had been specifically instructed not to consider prior pass-overs and had taken "a special oath to follow strictly the instructions provided the board about the appropriate criteria for selection"; and

(3) The Secretary of the Army had broad discretion to determine what constitutes an "appropriate" number of reservists on a selection board, and "the Secretary did not abuse his discretion in appointing reserve officers to the 1976 selection boards . . . ."

II

In *Doyle,* the Court of Claims, after holding that "the original 1974 and 1975 selection boards were improperly constituted because they did not include any Reserve officers as members," in violation of 10 U.S.C. § 266(a), 599 F.2d at 992, upheld the release from active duty of the Reserve officers based upon the two pass-overs by the relook boards. The court treated the relook boards as newly constituted selection boards, *see* 599 F.2d at 998, and concluded that "[t]he procedure for reconsideration by reconstituted selection boards . . . provided plaintiffs with a fair and complete opportunity to be considered for promotion in the manner intended by statute and regulation." 599 F.2d at 1004. The court further ruled that "[a]ny objection plaintiffs might have had to the fact that only officers in the primary zone were considered for promotion was waived" by their failure to raise the issue before the Correction Board. *Id.; see* 599 F.2d at 1000.

In the present case, the parties dispute whether the appellants raised this issue before the Correction Board. It is

unnecessary to resolve that question, however, since even if they did raise it, we conclude that the failure of the relook boards to consider for promotion officers in the secondary zone affords no basis for rejecting the action of those boards in passing over the appellants.

As *Doyle* indicates, the inquiry is not whether the relook board proceedings exactly duplicated the proceedings before the original selection boards, but whether the relook board proceedings afforded the appellants "a fair and complete opportunity to be considered for promotion in the manner intended by statute and regulation." 559 F.2d at 1004. We answer that question affirmatively.

In limiting the relook boards to consideration of only the primary zone officers, the Secretary apparently recognized that only those officers might have been prejudiced by the absence of reservists on the original selection boards and, therefore, that they were the only officers to be selected a second time. No Reserve officers in the secondary zone whom the original boards did not select challenged the composition of those boards. In essense, the Secretary allowed the actions of the original boards in selecting the secondary zone officers to remain unchanged. The appellants have not shown that any statute or regulation precluded the Secretary from adopting this reasonable and practical procedure. Since no change would be made in the original selection of secondary zone officers, there was no occasion for the relook boards to reconsider their selection.

Nor have the appellants given any convincing reason for believing that if the relook boards had considered secondary zone officers, the appellants' chances for promotion would have been increased. The appellants assume that if the relook boards had been permitted to consider secondary zone officers, they might have selected a smaller number from that zone than the original selection boards did, and that the relook boards therefore would have selected a larger number of primary zone officers. Although this argument has a superficial plausibility, it collapses in the light of the actual practice the selection boards followed in recommending officers for promotion.

The Secretary made it clear that he expected and insisted that the selection boards pick the maximum number of officers they were authorized to select from the secondary zone. *See Doyle,* 599 F.2d at 999. Indeed, when one of the 1974 selection boards indicated that it intended to select less than the maximum number of secondary zone officers, the Secretary abolished that board and appointed a new one, which selected the maximum number from that zone. 599 F.2d at 999 n.13. The Court of Claims held that in thus "rejecting the board's recommendations, the Secretary violated no statute or regulations, but instead properly implemented the selection process." *Sexton v. United States,* 228 Ct. Cl. 706, 709 (1981).

All the 1974 and 1975 selection boards, including those containing reservists, selected the maximum number of officers from the secondary zone. There is no reason to think that the relook boards, which were intended to replicate the original selection boards for those years, would have acted differently from the original boards and selected fewer than the full complements of secondary zone officers. As a practical matter the appellants have presented nothing that even suggests, much less shows, that there was any realistic likelihood that the relook boards would have selected a greater number of primary zone officers if they had been authorized to consider secondary zone officers a second time.

The appellants rely upon *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), where, in setting aside the pass-overs and release from active duty of Army Reserve officers situated similarly to the appellants, the court stated:

> By limiting the Relook Boards' duty to reconsider the primary zone alone, the Corrections Board eliminated a total of 664 promotion vacancies for which appellants could have otherwise competed. This reduction in the number of available slots materially affected appellants' prospects for promotion before the Relook Boards and deprived them of substantial rights guaranteed them by the statute.

603 F.2d at 925.

There is no indication, however, that in so ruling, the *Dilley* court considered the factors we have just discussed,

factors that, in our view, call for a contrary conclusion. For the reasons we have given, we cannot agree with *Dilley* that the relook boards' inability to consider secondary zone officers "materially affected appellants' prospects for promotion before the Relook Boards" or "deprived them of substantial rights guaranteed them by the statute."

In sum, we have no basis for rejecting the conclusion of the district court in this case that the relook procedure "provided an adequate remedy to those Reserve officers who were not selected by the original boards . . . ." *Bockoven v. Marsh,* Civ. No. 80-0417, slip op. at 17 (D.D.C. Mar. 28, 1983).

III

A number of the appellants were passed over by (1) the 1975 board, which contained no reservists, and (2) the 1976 board, which had reservists. In part IV we consider appellants' argument that the 1976 board did not have sufficient reservists. Here we address their contention that the proceedings before the 1976 board were fatally defective because that board had before it evidence of the appellants' prior pass-overs by the 1975 board.

The principal evidence upon which the appellants rely is the existence in the officers' personnel files of a pentagonal stamp mark, which the appellants assert indicated to members of the board that the officers had been before a prior selection board. The government denies that the stamp so indicated. Once again, it is unnecessary to resolve that disputed factual issue. Assuming, *arguendo,* that the 1976 board had evidence of the appellants' pass-overs by the improperly constituted 1975 board, that would not invalidate the decision of the 1976 board.

As the district court pointed out, in rejecting this argument with respect to the relook boards, the members of the board were under orders not to consider any prior pass-overs by an earlier board and had taken "a special oath to follow strictly the instructions provided the board about the appropriate criteria for selection." These facts are equally applicable to the 1976 board. We have no basis for rejecting the conclusion of the district court that "highly trained and dis-

ciplined Army officers should be presumed to have followed direct orders to disregard any information not properly before them in making their selection decisions."

The appellants argue that the fact that only a relatively small percentage of the officers passed over by the 1975 boards was selected by the 1976 boards shows that the evidence of non-selection had adversely affected the 1976 boards' consideration of the appellants. The conclusion does not follow from the premise. A more reasonable and convincing explanation is that the 1976 boards selected only a relatively small percentage of the officers the 1975 boards had passed over because the best qualified primary zone officers already had been promoted by the original 1975 board.

In *Dilley,* one of the two grounds upon which the court of appeals invalidated the pass-overs by the 1976 boards was that the officers' records before those boards reflected the "non-selection in 1975 even though appellants had never been lawfully passed over." 603 F.2d at 924. There is no indication in *Dilley,* however, that the court considered the instructions to the 1976 boards and the oath their members took. This is the keystone to our decision on the issue. We therefore do not follow *Dilley* in this respect.

IV

The final ground upon which the appellants challenge the procedures by which they were twice passed over is that the 1976 boards did not contain a sufficient number of reservists to satisfy the governing statute and the implementing regulations of the Secretary of the Army. Prior to 1980, the statute provided:

> Each board convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense.

10 U.S.C. § 266(a) (1976).

The Secretary of Defense prescribed the following "stan-

dards and policies" governing the Reserve membership of boards:

> The Secretaries of the Military Departments will, with due regard to availability of qualified reservists, pertinent statutory provisions, the nature of the board action, and the categories, regular and reserve, which may be considered by the board, provide in the membership of the indicated boards to the fullest practicable extent a fair and adequate representation of members from the reserve components.

Department of Defense Instruction 1205.4 (1952). In turn, the Secretary of the Army provided that

> [w]henever a zone of consideration includes non-regular officers, selection boards will, where practicable, include at least one officer of the Reserve components.

Army Regulation 624-100 ¶ 16b(5) (1968).

(The statute was amended in 1980 to provide that promotion boards "shall include at least one member of the Reserves . . . . " 10 U.S.C. § 266(a) (1982).)

The number of members, the number and percentage of reservists on the 1976 selection boards, and the percentage of officers the boards considered who were reservists, is shown in the following table:

Board	Members	Reservists		Percent of officers Board considered who were reservists
CWO	15	3	20.0%	56.0%
MAJ., AUS	15	3	20.0%	52.5%
LT. COL., AUS	15	2	13.3%	33.1%
LT. COL., AMEDD	6	1	16.6%	19.0%
LT. COL., JAGD	6	1	16.6%	6.4%

The appellants argue that the "appropriate number" of reservists a selection board must have is one that produces a percentage of reservists on the board that is "roughly equal" to the percentage of reservists among the officers the board will consider. They conclude that because the percentage of reservists on the first three boards shown above, which considered all but two of the appellants in this category, was less than half the percentage of reservists among all the

officers each board considered, the Reserve membership of the boards did not satisfy the statute.

We do not read section 266(a) as having required the Secretary of the Army to appoint to selection boards the number of reservists that was proportionately equal to the number of reservists the board would consider. To the contrary, we conclude that the statute gave the Secretary substantial discretion to determine what constitutes an "appropriate number" of reservists and that the appellants have not shown that the number of reservists on the 1976 boards was not "appropriate."

Section 266(a) in terms gave the Secretary extremely broad discretion to determine how many reservists to include on selection boards. It specified only that he should include an "appropriate number" and left it to the Secretary to "prescribe" that number under "standards and policies prescribed by the Secretary of Defense." The only limitation the statute imposed upon the Secretary's discretion was that he must exercise it in accordance with those "standards and policies."

The Secretary of Defense prescribed only one "standard[] and polic[y]": that the service Secretaries should provide in the Board's membership "a fair and adequate representation of members from the reserve components." The issue under the statute and regulations is whether the number of reservists on the 1976 board provided fair and adequate representation for the Reserve officers the boards considered for promotion. As we explain below, we cannot say that the Secretary of the Army abused his discretion in not appointing a greater number of reservists to the 1976 board.

The appellants argue that the legislative history of section 266(a) required proportionate equality between the number of reservists on the board and the number of reservists the board considers. They rely primarily on the statement in the House and Senate committee reports that "the proportion of Reserve officers on the board should be roughly equal to the proportion of Reserves being considered." S. Rep. No. 1795, 82d Cong., 2d Sess. 35-36, *reprinted in* 1952 U.S. Code Cong. & Ad. News 2005, 2042; *see* H.R. Rep. No.

1066, 82d Cong., lst Sess. 49 (1951). Our reading of the legislative history, however, produces a different conclusion.

Section 266(a) originally was enacted as part of the Armed Forces Reserve Act of 1952, ch. 608, § 254, 66 Stat. 481, 496. The House version of the section merely provided that boards, including promotion boards, "shall include appropriate numbers of members of the reserve components" and did not include the additional language "as prescribed by the appropriate Secretary in accordance with standards and policies established by the Secretary of Defense." H.R. 5426, § 255, 82d Cong., 1st Sess., 97 Cong. Rec. 13148, 13153 (1951). The latter language was added by the Senate, which also changed the words "appropriate numbers" to "appropriate representation." *See* H.R. 5426, § 249, 82d Cong., 2d Sess., 98 Cong. Rec. 8294, 8298-99 (1952). The House and Senate committee reports used similar "roughly equal" statements with respect to the different versions of this provision.

The legislation went to conference, and the House accepted the Senate version of this provision, although reverting to the phrase "appropriate numbers." The conference committee report consisted of the Statement of the Managers on the Part of the House. They stated that "[s]ection 255 of the House bill provides that boards for the promotion . . . of reservists shall include appropriate numbers of reservists . . . " and that the Senate had "modified" it

> so as to provide more flexibility by allowing the Reserve representation on such boards to be established by regulation . . . .

H.R. Rep. No. 2445, 82d Cong., 2d Sess. 32-33, *reprinted in* 1952 U.S. Code Cong. & Ad. News 2057, 1058.

Although the committee reports on both versions of the provision had used the same "roughly equal" language with respect to it, in light of the conference committee report we do not construe section 266(a) as having limited the Secretary's authority to establish Reserve representation on the boards to specifying the boundaries of rough equality. Rather, we conclude that Congress intended to give him broad

discretion to specify by regulation what constitutes an appropriate number of reservists.

The committee report merely stated that the proportion of reservists on the Board "should be" roughly equal to the proportion of reservists being considered. This language was horatory rather than mandatory. As the district court pointed out, Congress did not include the "roughly equal" language in the statute itself, although it easily could have done so if it had intended to impose that requirement. *Compare* § 266(a) §cf185with Reserve Officer Personnel Act of 1954, ch. 1257, § 203(b), 68 Stat. 1147, 1150 (codified at 10 U.S.C. § 3362(b) (1982)) (providing that at least one-half the members of any board considering reservists for permanent promotion must be reservists).

The appellants also rely on *Stewart v. United States*, 611 F.2d 1356 (Ct. Cl. 1979), where the Court of Claims held that one Reserve officer on an Air Force board of 25 officers was not "an appropriate number" under section 266. The court quoted the "roughly equal" language in the Senate committee report and stated that "one out of 25 is not even close to being proportionate to the number of Reserve officers being considered for promotion (30 percent)." 611 F.2d at 1359. The court restricted its decision to that particular board and left open questions concerning the validity of boards containing "additional board members from the Reserve." 611 F.2d at 1361.

We do not read *Stewart* as adopting the "roughly equal" standard for determining whether a board contained an "appropriate number" of reservists. The actual holding in *Stewart* was that, in the particular circumstances there, one out of 25 reservists was not an appropriate number because it was merely "token Reserve officer membership." 611 F.2d at 1360. The court's references to the "roughly equal" test were merely passing statements made in support of its conclusion.

In *Teeter v. Marsh*, Civ. No. 80-2670 (D.D.C. August 29, 1983), another judge of the United States District Court for the District of Columbia adopted the "roughly equal" test. For the reasons given in this opinion, we cannot accept that analysis.

The appellants have not shown, and apparently have not even argued, that apart from the "roughly equal" standard, the number of reservists on the 1976 boards was not an appropriate number. In contrast to *Stewart*, the percentage of reservists on the board in this case ranged from 20 to 13.3, and the comparative percentages of the reservists on the board and among the officers considered ranged from more than twice as many to slightly more than one-third.

In sum, the appellants have not shown that the number of reservists on the 1976 boards did not provide "a fair and adequate representation of members of the Reserve components," as the regulation of the Secretary of Defense required, or that they did not constitute an "appropriate number" under section 266(a). In view of the limited scope of our review of military personnel issues, *see Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), that is the end of the matter.

V.

In *Doyle*, the court held that the officers who had been discharged because the invalid 1974 and 1975 boards twice had passed them over, were entitled to backpay from the time of their release from active duty until the second pass-over by the relook boards. In the present case, the appellants who had been passed over by only one invalid board (the 1975 board) were not released from active duty until the 1975 relook boards passed them over following the pass-overs by the valid 1976 boards. Since those appellants were not released until there had been two pass-overs by valid selection boards, they are not entitled to backpay.

The other appellants—those who were released following the two pass-overs by the 1972 and 1974 or the 1974 and 1975 invalid boards—contend that even if we reject their other arguments, at least they are entitled to backpay for the period between their release and their second pass-over by the relook boards, as occurred in *Doyle*. The district court did not discuss this contention. The government argues that the appellants did not make the point in the district court and therefore are precluded from raising it here.

We have reviewed the briefs and other pleadings filed in the district court and cannot find therein any assertion of

this claim by the appellants. If the appellants were seeking this alternative lesser relief, they were obliged to bring it to the attention of the district court, so that that court could consider it. Since the district court discussed the appellants' contentions in some detail, its failure even to mention this argument strongly suggests that the appellants did not raise it in that court.

The attorney who represents the appellants in this court also represented them in the district court. He has given no explanation for his failure to raise the issue there. Perhaps, as the government suggests, it represented a calculated decision not to jeopardize his hope of winning more broadly by also raising a narrower claim that only some of the appellants could have asserted. Having in effect waived that claim in the district court, he cannot resurrect it in this court, and we decline to consider it.

The judgment of the district court is affirmed.

AFFIRMED.

In The United States Court of Appeals for the Federal Circuit

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Nos. 83-1032 through 83-1051

David N. Bockoven, et al.
Appellants

v.

John O. Marsh, et al.
Appellees

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

FOR THE COURT

/s/

George E. Hutchinson, Clerk

March 27, 1984

cc: Keith A. Rosenberg
Louis R. Davis

(2) (1)

Nos. 83-2134 and 83-6876

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID N. BOCKOVEN, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

HARRIS J. GELBER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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19 pp.

QUESTIONS PRESENTED

1. Whether Army "Relook Boards," created to reconsider for promotion Reserve officers previously considered by improperly constituted boards, unfairly narrowed the availability of promotion slots.

2. Whether promotion boards that contained 13% to 20% Reserve officer membership lacked an "appropriate number" of Reserve officers within the meaning of 10 U.S.C. (1976 ed.) 266(a).

3 Whether promotion board members' alleged knowledge that Reserve officers previously had been passed over for promotion by an improperly constituted board prejudiced the later promotion board proceedings.

4. Whether the court of appeals correctly rejected a claim for back pay that was raised for the first time on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2134

DAVID N. BOCKOVEN, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

No. 83-6876

HARRIS J. GELBER, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-26a)[1] is reported at 727 F.2d 1558. The opinion of the district court (Pet. App. 3a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1984 (Pet. App. 12a). A petition

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[1] "Pet. App." refers to the appendix in No. 83-2134.

for rehearing was denied on March 27, 1984 (Pet. App. 27a). The petitions for a writ of certiorari were filed on June 6, 1984 (No. 83-6876) and June 25, 1984 (No. 83-2134).

STATEMENT

1. At the time of the events underlying this litigation, Army officers serving on active duty, both Regular and Reserve, could obtain promotions to temporary rank in the Army of the United States. Periodically, officers were considered for such promotions by Army selection boards based on their service records. Officers eligible to be selected for temporary promotion were separated into two "zones of consideration," a primary zone for more senior officers and a secondary zone for more junior officers. Selection boards were limited as to the total number of officers they could select for promotion and were further limited as to the number of officers they could select from the secondary zone. Army regulations provided that a primary zone Reserve officer who was twice passed over for a temporary promotion would be released from active duty. Secondary zone officers who were not selected for promotion, however, were not considered "passed over" for purposes of release from active duty.[2]

This litigation arises out of the actions of two successive promotion selection boards constituted in

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[2] Following the enactment of the Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 *et seq.*, which became effective on September 15, 1981, the Army and the other military services generally discontinued use of this system of temporary and permanent ranks. The operation of promotion boards under the new system, however, is generally comparable to the prior system.

1974 and 1975. Fifteen percent of the selections in those years were secondary zone officers, the maximum percentage allowable; the remaining 85% were primary zone officers. The boards, however, failed to contain any Reserve officer membership despite the statutory requirement of 10 U.S.C. (1976 ed.) 266 that they contain an "appropriate number" of Reserves because they were considering the promotion of Reserve officers.

In response to complaints that the 1974 and 1975 determinations were invalid, the Secretary of the Army in 1976 convened selection boards containing Reserve officer membership in an effort to reconstruct the deliberations of the original 1974 and 1975 boards. These reconstituted boards (Relook Boards) reviewed the officers' records as they appeared at the time they were reviewed by the original boards and followed the same instructions and selection criteria provided to the original boards. Because those officers objecting to the determinations of the original boards were all primary zone officers, the Relook Boards reconsidered only primary zone officers, and the boards were authorized to select officers to fill only the 85% of the promotion slots that had originally been filled by primary zone officers.

The Relook Boards selected some officers who had been passed over by the original boards, but other officers were again passed over. Those officers selected by the Relook Boards were reinstated to active duty and treated as if they had been selected by the original boards; those passed over were treated as if they had been validly passed over by the original boards. See generally Pet. App. 13a-15a; *Doyle* v. *United States*, 599 F.2d 984, 988-990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980).

2. Petitioners are Army Reserve officers who were separated from active duty on the basis of two successive passovers, in some cases by the 1974 and 1975 boards and in some cases by the 1975 and 1976 boards. They brought this action in the United States District Court for the District of Columbia, challenging their separations on the ground that the passovers were invalid. Specifically, petitioners alleged that the Relook Boards did not produce valid passovers because the number of promotion vacancies available was reduced from the total available to the original boards by eliminating the number of vacancies filled by the secondary zone officers selected by the original boards. In addition, those petitioners who were passed over by the 1976 promotion boards, which contained between one and three Reserve officers (see Pet. App. 21a), claimed that their 1976 passovers were invalid because: (1) their records before the 1976 promotion boards allegedly reflected, and were tainted by, passovers by the original 1975 boards; and (2) the Reserve membership did not satisfy the statutory requirement of an "appropriate number" of Reserve officers. Petitioners sought retroactive reinstatement to active duty, back pay and allowances in an amount not exceeding $10,000, and correction of their military records.

The parties filed cross-motions for summary judgment. On March 28, 1983, the district court issued an order denying petitioners' motion for summary judgment and granting the government's motion. In its opinion (Pet. App. 3a-11a), the court found that: (1) the Relook Boards' consideration of only the number of vacancies filled from the primary zone by the original boards did not affect its determinations and hence did not render passovers by these boards

invalid (*id.* at 5a-6a); (2) even assuming that some members of the 1976 selection boards were aware of prior passovers by the original 1975 boards, this was not material error because the board members presumably followed their oaths and their instructions not to consider prior passovers (*id.* at 6a-7a); and (3) the 1976 boards had an appropriate number of Reserve members (*id.* at 7a-11a).

The court of appeals affirmed, essentially for the reasons stated by the district court (Pet. App. 12a-26a). In addition, the court of appeals rejected the claim of certain petitioners to back pay for the period between their release from active duty after being passed over by the original 1974 and 1975 boards and the reconsiderations by the Relook Boards. The court held that petitioners had waived that claim by failing to raise it in the district court (*id.* at 25a-26a).

ARGUMENT

The decision of the court of appeals is correct. Moreover, because this case arises out of an isolated incident that occurred in 1974 and 1975 and involves a statute (10 U.S.C. (1976 ed.) 266) that has since been amended, the issues presented here are of little continuing significance. Accordingly, review by this Court is unwarranted.

1. Petitioners in No. 83-2134 contend (Pet. 1-2) that they were denied fair and adequate consideration for promotion because the Relook Boards did not have the opportunity to select them for vacancies originally filled by selections from the secondary zone. The court of appeals correctly rejected this claim, finding that petitioners received a "fair and complete opportunity to be considered for promotion in the manner intended by statute and regulation"

(Pet. App. 17a (quoting *Doyle* v. *United States*, 599 F.2d at 1004)). The Army's efforts to provide administrative relief for the error in the composition of the 1974 and 1975 promotion boards plainly were adequate despite the fact that primary zone officers did not have the opportunity to compete again for some of the 15% of the vacancies originally filled by the secondary zone promotions, which were not challenged. As the court of appeals found (Pet. App. 17a), petitioners have failed to give "any convincing reason for believing that if the relook boards had considered secondary zone officers, [their] chances for promotion would have been increased." As a practical matter, it is clear that the promotion boards were expected to select the maximum number of secondary zone officers permitted (*id.* at 6a, 18a). Thus, in the words of the district court (*id.* at 6a), petitioners' contention that reconsideration of the secondary zone vacancies would have made any difference is "hardly credible."

The procedure adopted by the Army was "reasonable and practical" and fully consistent with all relevant statutes and regulations (Pet. App. 17a). Especially in view of the well established principle that the courts should not lightly interfere with internal decisions of the military (see, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953)), the courts below correctly refused to invalidate the determinations of the Relook Boards because of the speculative possibility that another officer might have been promoted if the Army in its discretion had tailored the administrative remedy differently. See also *Jones* v. *Alexander*, 609 F.2d 778 (5th Cir.), cert. denied, 449 U.S. 832 (1980).

2. Petitioners contend (83-2134 Pet. 17-18; 83-6876 Pet. 4-11) that the 1976 regular promotion

boards did not contain an "appropriate number" of Reserve members because the Reserve membership was not roughly proportionate to the percentage of Reserves considered by the boards. At the outset, we note that this issue is of no continuing significance. The statute in question, 10 U.S.C. 266, was amended in 1981 to provide that the covered promotion boards must "include at least one member of the Reserves, with the exact number of Reserves determined by the Secretary concerned in his discretion." Thus, if promotion boards identical in composition to the 1976 boards were constituted today, there could be no doubt that they would satisfy the statutory directive. Resolution of the question presented here therefore will have no effect except in cases involving old promotion boards and the predecessor statute. In any event, the court of appeals correctly held that the 1976 boards satisfied the "appropriate number" criterion of the earlier statute.

Following extensive examination of the legislative history, the court of appeals found that Section 266 did not impose a rigid proportionality requirement, but instead gave the Secretary of the Army "extremely broad discretion" to determine what constitutes an "appropriate number" of Reserves to serve on a promotion board (Pet. App. 22a). Petitioner Gelber contends (83-6876 Pet. 5-9) that, despite the discretionary language of the statute, the committee reports demonstrate that Congress intended to impose a "roughly proportional" requirement on Reserve officer membership. The court of appeals fully considered and rejected this contention. The court explained that the conference committee report stated that a later amendment giving the service secretaries authority to prescribe the appropriate number of Reserve officers on the boards

was intended to "provide more flexibility" in this regard. The court correctly held that the evidence in the conference report, along with the plain language of the statute, predominated over the precatory language in earlier committee reports suggesting that the proportion of Reserves should be "roughly equal." Pet. App. 23a-24a; see H. R. Rep. 2445, 82d Cong., 2d Sess. 32-33 (1952). Accord, *Teeter* v. *Marsh*; Civ. No. 80-2670 (D.D.C. Feb. 29, 1984), appeal pending, No. 84-5200 (D.C. Cir. filed Mar. 30, 1984), and *Poklemba* v. *Marsh*, Civ. No. 80-2715 (D.D.C. Feb. 29, 1984), appeal pending, No. 84-5209 (D.C. Cir. filed Mar. 30, 1984) (appeals transferred in both cases to Federal Circuit July 10, 1984). It would serve no purpose for this Court further to plumb the legislative history of this superseded version of 10 U.S.C. 266.

Both petitioners claim (83-2134 Pet. 17-18; 83-6876 Pet. 9-11) that the decision below conflicts on this point with *Stewart* v. *United States*, 611 F.2d 1356 (Ct. Cl. 1979). Even if that assertion were correct, it would provide no basis for review by this Court, because the court below is the successor to the Court of Claims and hence petitioners are alleging no more than an intracircuit conflict. In fact, however, there is no conflict between *Stewart* and the decision below.

In *Stewart*, the Court of Claims considered a promotion board that contained one Reserve officer out of 25 members. The court intimated that this composition did not satisfy the statutory requirement, although it made no final decision pending administrative action. Plainly, this ruling has no bearing here, where the percentage of Reserve officer membership on the challenged boards varied from 13.3% to 20%. Petitioners apparently rely on language in *Stewart*

quoting approvingly the Senate Report on 10 U.S.C. (1976 ed.) 266 and suggesting that the statute required "rough equality" (see 611 F.2d at 1359), but the court below found that suggestion to be dictum and emphatically rejected it. There is no reason for this Court to second-guess the court of appeals' reading of its own precedent.

3. Petitioners in No. 83-2134 also claim (Pet. 2, 18-19) that certain of them were denied fair and equitable promotion consideration because the 1976 promotion boards allegedly were aware of their passovers by the improperly constituted 1975 boards.[3] Both courts below assumed arguendo that the 1976 promotion boards did know of petitioners' passovers by the improperly constituted 1975 boards, but held that the 1976 determinations were unaffected by that knowledge, given that all members of the boards had taken special oaths to comply with direct orders not to consider such information (Pet. App. 7a, 19a-20a). The court of appeals found no basis for rejecting the district court's conclusion that "highly trained and disciplined Army officers should be presumed to have followed direct orders to disregard any information not properly before them in making their selection decisions." See *Rogers* v. *United States*, 270 U.S. 154, 161 (1926) (it could be presumed that a military classification board did not consider evidence that the board of inquiry, whose decision it was reviewing, was instructed to

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[3] Some of the files provided to the boards may have contained documents bearing a code symbol indicating—to someone who understood the code—that the officer had been considered by a previous board (see Pet. App. 6a-7a).

disregard). Petitioners do not even attempt to suggest how the court of appeals erred on this issue.[4]

4. Petitioners in No. 83-2134 argue (Pet. 19-20) that they should be permitted to pursue an alternative claim to back pay from the date of separation until the date of final action by the Relook Boards. They offer no explanation for failing to identify this claim in their complaint, however, and therefore there appears to be no basis for affording such relief. The court of appeals held that, since petitioners did not raise this claim before the district court, it would not consider the issue (Pet. App. 26a). This ruling is consistent with standard practice in the courts of appeals and with the rule applied by this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

5. Pointing to the fact that a number of cases are still pending involving issues arising out of the decisions of the 1974-1976 promotion boards, petitioners in No. 83-2134 contend (Pet. 13-17) that the Court should grant certiorari to resolve a conflict between the decision below and *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1979). This contention is without merit.

First, while it is true that some of the petitioners are similarly situated to the *Dilley* plaintiffs yet did

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[4] Petitioners do allege (82-2134 Pet. 18-19) that the court of appeals' decision on this issue conflicts with *Horn* v. *United States*, 671 F.2d 1328 (Ct. Cl. 1982). *Horn*, however, did not consider a situation in which promotion board members had sworn not to consider particular information—the fact that formed the basis for the decision below. Moreover, to the extent there is any tension between this case and *Horn*, that is an intracircuit matter not warranting this Court's review.

not receive the same relief, it is not clear that there is a genuine conflict between the two decisions. The court of appeals in this case observed that, although the *Dilley* court had found the Army procedures defective because of the failure to reconsider secondary zone vacancies and the 1976 board members' possible awareness of passovers by the original 1975 boards, there was no indication that the *Dilley* court had considered the factors that the court below found decisive, *i.e.*, the absence of any likely practical effect of reconsidering secondary zone vacancies and the special instructions and oaths taken by the board members (see Pet. App. 18a, 20a). Thus, if another case like this one were to come before it, there is no assurance that the District of Columbia Circuit would reach a result different from that reached below.

At all events, any conflict between the court below and the District of Columbia Circuit is of no continuing significance. Under the Federal Courts Improvement Act of 1982, the Federal Circuit has exclusive appellate jurisdiction over military pay claims under the Tucker Act. See 28 U.S.C. 1295 (a) (2). All subsequent cases raising these issues will be governed by the precedent in this case.[5] Therefore, the alleged conflict with *Dilley* will not give rise to any disparate results in the future, and there is no need for this Court to resolve it.

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[5] All pending trial level cases cited by petitioners (83-2134 Pet. 14-15 n.8) are Tucker Act suits before the United States Claims Court and are therefore governed by Federal Circuit precedent. *Teeter* v. *Marsh*, No. 84-5200, and *Poklemba* v. *Marsh*, No. 84-5209, which petitioners list (83-2134 Pet. 15 n.8) as pending in the District of Columbia Circuit, have been transferred to the Federal Circuit in light of 28 U.S.C. 1295(a)(2). See App., *infra* 1a-2a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CA 80-02670

No. 84-5200

MAJOR WILLIAM JAMES TEETER, ET AL., APPELLANTS

v.

JOHN O. MARSH, JR.,
SECRETARY OF THE ARMY, ET AL.

And Consolidated Case No. 84-5209

[Filed Jul. 10, 1984]

Before: Tamm, Edwards, and Starr *, Circuit Judges

ORDER

Upon consideration of appellees' motion to transfer and of appellants' opposition thereto, it is

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* Circuit Judge Starr did not participate in the foregoing Order.

ORDERED by the Court that the motion is granted. The Clerk is hereby directed to transfer these consolidated appeals to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1631. Appellants below sought retroactive reinstatement to active duty status, and "an award of active duty pay and allowances from the date of their release to the date of the judgment." As noted by the district court in its memorandum opinion of August 29, 1983, the district court's jurisdiction over this latter claim was, of necessity, dependent upon 28 U.S.C. § 1346(a)(2). As a result, this court lacks jurisdiction over these consolidated appeals. *See* 28 U.S.C. § 1295(a)(2). It is

FURTHER ORDERED that the Clerk is directed to send a copy of this Order to the District Court.

Per Curiam

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